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No. 85-946

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

KERR-MCGEE CORPORATION, a Delaware Corporation, and KERR-MCGEE NUCLEAR CORPORATION, a Delaware Corporation,
Petitioners,
v.
BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, deceased,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The arguments submitted by respondent in opposition to Kerr-McGee's petition merely confirm that this case warrants review and summary disposition. Although most of respondent's arguments are clearly insubstantial on their face, a brief reply is in order.

ARGUMENT

I. At the trial, respondent submitted almost no evidence about how plutonium was taken from the plant to Karen Silkwood's apartment, and made no showing whatever that the contamination of the apartment was caused by willful and wanton misconduct by Kerr-McGee. Instead, respondent presented highly prejudicial evidence of alleged prior acts relating generally to the overall op-

eration of the Kerr-McGee plant and having no possible causal relationship to the contamination of Ms. Silkwood's apartment. Respondent's obvious strategy was to seek to persuade the jury that Kerr-McGee was a "bad" company that should be punished for its prior "sins" even though there was no evidence of any wrongdoing by Kerr-McGee that caused plutonium to escape from the plant to the apartment. The district court's instructions permitted the jury to "infer" malice simply "from the fact that some plutonium contamination had occurred and from the testimony of [respondent's] experts as to overall operating conditions at the plant." Pet. App. 81a.

A. Respondent contends (Br. in Opp. 7; emphasis and footnote omitted) that "there was ample evidence presented of [Kerr-McGee's] reckless disregard and conscious indifference at the time of the contamination." But respondent simply ignores the fact that, as the court of appeals itself acknowledged, there was no direct causal connection between respondent's evidence and "the escape of plutonium in this particular instance." Pet. App. 8a. The court nonetheless concluded that this general evidence of alleged corporate indifference was admissible, and could serve as the basis for a finding of malice necessary to support an award of punitive damages, because "a jury may permissibly infer from a pattern of negligence likely to cause a particular kind of injury that such negligence did indeed cause the injury." *Id.*

As we have shown in the petition (at pp. 9-12), this conclusion is flatly contrary to Rule 404(b), which bars the use of evidence of prior acts to prove propensity. Respondent attempts to justify the court of appeals' reliance on evidence of alleged prior acts on the ground that this evidence may be relevant to establish such elements as intent, motive or causation (Br. in Opp. 8). Respondent's sole authority for his assertion that such evidence was properly considered to prove causation in this case is *Ramos v. Liberty Mutual Ins. Co.*, 615 F.2d 334, 338-340 (5th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).

Ramos is indeed illustrative of those circumstances where causation may be demonstrated by prior acts evidence—*i.e.*, where a product defect is sought to be proved by other substantially similar product failures. In such cases, evidence of prior similar occurrences is admissible *notwithstanding* that it also shows prior tortious conduct of the defendant. Here, however, respondent did not seek to show any product defect, but proffered evidence of alleged prior negligence of Kerr-McGee *in order to prove* that similar misconduct caused the contamination in this case. This is precisely what Rule 404(b) proscribes.

Thus, the courts have held that before evidence of prior acts may be admitted, the trial court must first determine "that the extrinsic offense evidence is relevant to an issue other than the defendant's character." *United States* v. *Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979). Even if the *Ramos* product defect cases were apposite to the kind of character evidence relied upon by respondent to prove causation, however, respondent could not benefit from them. As the court in *Beechum* explained:

> Where the evidence sought to be introduced is an extrinsic offense, its relevance is a function of its similarity to the offense charged. In this regard, however, similarity means more than that the extrinsic and charged offense have a common characteristic. For the purposes of determining relevancy, "a fact is similar to another only when the common characteristic is the significant one for the purpose of the inquiry at hand." Therefore, similarity, and hence relevancy, is determined by the inquiry or issue to which the extrinsic offense is addressed.

Id. (citation omitted). The proper application of this rule is illustrated by a number of recent decisions. *E.g.*, *Gumbs* v. *International Harvester, Inc.*, 718 F.2d 88 (3d Cir. 1983); *McKinnon* v. *Skil Corp.*, 638 F.2d 270 (1st Cir. 1981).

Gumbs was an action for damages allegedly caused by the snapping of a U-bolt on a truck manufactured by the defendant Harvester. The plaintiff sought to introduce Department of Transportation reports of other accidents involving U-bolts on Harvester trucks, to show notice and knowledge by Harvester of alleged defects in its U-bolts. In holding that this evidence should have been excluded, the court of appeals noted that "for evidence to be relevant there must be some logical relationship between the proffered evidence and plaintiff's theory of the case." 718 F.2d at 97. Noting that Harvester had changed the U-bolts used in its trucks before the truck operated by the plaintiff had been manufactured, and that the plaintiff's claim involved the snapping of a U-bolt whereas the Department of Transportation inquiry examined the loosening of U-bolts, the court concluded that the plaintiff had failed to carry his burden of showing that the proffered evidence of prior incidents was logically related to the accident at issue. *Id.* at 98.

Likewise, in *McKinnon*, the court of appeals held that evidence of prior accidents was properly excluded because the plaintiff had not met his burden of demonstrating the substantial similarity of the prior accidents to the accident at issue. There, the plaintiff, who alleged that he was injured while operating an electric saw with a defective lower blade guard, sought to introduce evidence of prior accidents involving the defendant's saws to establish knowledge and causation. The court of appeals observed that such evidence is admissible for such purposes "only if the proponent of the evidence shows that the accidents occurred under circumstances substantially similar to those at issue in the case at bar." 638 F.2d at 277. Because the record contained no showing of the circumstances under which the prior accidents had occurred, the court concluded that the plaintiff "failed to make the requisite showing that any of these alleged incidents had involved a defective lower blade guard." *Id.*

Unlike the courts in *Gumbs* and *McKinnon*, the court of appeals in this case did not engage in the careful scrutiny of prior acts evidence required by Rule 404(b). Here, none of respondent's alleged prior acts evidence involved the contamination of an employee's home. The court below nonetheless relied on the evidence of unrelated prior acts in holding that respondent had sustained his burden of proving that Kerr-McGee was liable for punitive damages in connection with the contamination of Karen Silkwood's apartment. This result is contrary not only to Rule 404(b), but to elementary considerations of fairness embodied in the Due Process Clause.

B. As three Justices of this Court have noted, "[u]nder accepted principles of tort law punitive damages may not properly be awarded on the basis of negligent conduct. A jury therefore must find malicious, wanton or grossly negligent conduct." Pet. App. 87a. However, despite the absence of "any evidence whatever of the 'oppression,' 'fraud,' 'malice' or 'wanton reckless[ness]' " necessary to support an award of punitive damages under Oklahoma law (*id.* at 87a), "[t]hese serious conclusions simply were 'inferred'—in the absence of specific evidence —from the fact that some plutonium contamination had occurred and from the testimony of [respondent's] experts as to overall operating conditions at the plant." *Id.* at 81a. "[B]y instructing the jury that it could infer malice, fraud or gross negligence . . . [the district court] in effect authorized the jury to impose punitive damages *without fault*." *Id.* at 89a (emphasis in original). As explained in the petition (at pp. 12-14), this result deprived Kerr-McGee of its right to due process of law.

The only specific evidence of alleged deficiencies cited by respondent (Br. in Opp. 6-7 nn. 7, 9) merely underscores the unfairness of holding Kerr-McGee liable for punitive damages. For example, despite respondent's suggestion to the contrary, Kerr-McGee fully complied with NRC standards in using an instrument capable of detect-

ing the removal of 0.5 gram of plutonium. Indeed, respondent presented no evidence that other instruments were available that would have detected the removal of the tiny quantity of plutonium—0.0003 gram—at issue here. Nor was there any evidence that other measures would have prevented the apartment contamination.[1]

There is a simple explanation for respondent's failure to present evidence of a direct causal connection between Kerr-McGee's overall operating procedures and the contamination of Ms. Silkwood's apartment. The NRC determined—following a thorough investigation—that the contamination of Ms. Silkwood's apartment was *not* attributable to any wrongdoing by Kerr-McGee. The NRC's report concluded that "Kerr-McGee's only violation of regulations throughout the incident was its failure to maintain a record of the dates of two urine samples submitted by Silkwood." Pet. App. 44a. That failure obviously did not cause the contamination of the apartment. Accordingly, the decision of the court of appeals—that punitive damages could be awarded on the basis of evidence of prior unrelated instances of alleged misconduct—sanctions a clear violation of Rule 404(b) and should be summarily reversed.

II. A. In the petition for certiorari, we showed that the court of appeals should have certified two important, unresolved questions of state law to the Supreme Court

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[1] Respondent's reference to Kerr-McGee's alleged violation of inventory difference limits (Br. in Opp. 6 n.7) is unavailing, since there is no evidence that any of the supposedly "missing" plutonium escaped from the plant. Similarly, although respondent emphasizes that the chief of the Health Physics program at the plant obtained a degree in poultry husbandry (Br. in Opp. 7 n.9), respondent neglects to mention that this individual had 20 years' experience in health physics (Tr. 4414). Moreover, respondent does not suggest any causal relationship between this individual's degree and the contamination of Ms. Silkwood's apartment.

In addition, respondent's vague references to such general matters as "plant design" and "worker training" (Br. in Opp. 7 n.9) do not demonstrate how such evidence could be deemed relevant and hence admissible under Rule 404(b).

of Oklahoma. Respondent principally contends that this issue does not warrant review because Kerr-McGee's request for certification was not made until the petition for rehearing stage. Br. in Opp. 10-12, 17-19. This Court's cases demonstrate, however, that the dispositive factor is not timing, but the appropriateness in a given case of obtaining a definitive state court ruling on the particular state law questions involved.

For example, in *Kaiser Steel Corp.* v. *W.S. Ranch Co.*, 391 U.S. 593 (1968), *rev'g* 388 F.2d 257 (10th Cir. 1967), the court of appeals, following its decision on the merits of a state constitutional issue, denied a petition for rehearing and a request that it stay the federal court proceedings to await determination of the state law issue in a declaratory judgment action that was then pending in the state courts. 388 F.2d at 262. This Court summarily reversed and remanded, stating that "[t]he Court of Appeals erred in refusing to stay its hand." The Court added that "[s]ound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other[s]. . . ." *Id.*[2]

Similarly, in *United Gas Co.* v. *Ideal Cement Co.*, 369 U.S. 134 (1962), the Court had before it an appeal concerning the constitutionality of certain municipal license code provisions. The court of appeals had interpreted those provisions and had held them unconstitutional. This Court, acting *sua sponte*, vacated the judgment of the court of appeals to permit a construction of the municipal code provisions by the state courts. In so doing, the Court stated:

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[2] To be sure, the Court noted that even before the case reached the court of appeals, the district court had rejected the suggestion that the action be stayed pending decision of the state law question in the state courts. 391 U.S. at 593-594. There is, however, absolutely no intimation in this Court's opinion that the Court considered this factor significant in its disposition of the case.

> The interpretation of state law by the Court of Appeals, in an opinion by its Alabama member, was rendered in advance of construction of the License Code by the courts of the State, which alone, of course, can define its authoritative meaning. We ought not, certainly on this record, either accept the Court of Appeals' construction or, on an independent consideration, reject what the Alabama Supreme Court may later definitively approve. The availability of appropriate declaratory-judgment proceedings under [state law] avoids this unsatisfactory dilemma. Wise judicial administration in this case counsels that decision of the federal question be deferred until the potentially controlling state-law issue is authoritatively put to rest.

Here, as in *Kaiser Steel*, *United Gas*, and similar cases cited in the petition (at pp. 16-17), there is readily available a procedure for obtaining an expedited and definitive ruling on important state law questions such as those decided below by the court of appeals. Consistent with this Court's decisions, the court of appeals should have employed the certification procedures provided for by Oklahoma law.

B. Respondent cryptically asserts (Br. in Opp. 12-17) that, even though the two issues of state law on which Kerr-McGee sought certification are novel and unsettled, the issues are not "sufficiently" novel and unsettled to have justified certification. We disagree. If, as the court of appeals observed and respondent concedes, the issues have not been resolved, the court below should have ordered certification, given the important policy implications under state law and the critical effect of these issues to the further conduct of this case.

(1) Contrary to respondent's contentions (Br. in Opp. 12, 14), it is respondent, not petitioners, who has mischaracterized the issues with respect to which Kerr-McGee sought certification. The first issue is not, as

respondent simplistically puts it, whether a plaintiff may recover punitive damages for injury to property where recovery for personal injuries is barred by the Oklahoma Workmen's Compensation Act. Rather, the issue is whether damage to property can be a basis for an award of punitive damages where the property damage has been incurred *wholly incidental to* a covered personal injury. It is this unsettled question that raises significant policy questions under state law.

(2) With regard to the substantial compliance issue, respondent seriously misconstrues the scope of this Court's prior decision in this case. The Court simply held that respondent's claim for punitive damages under state law was not preempted by federal law. It clearly did not hold, nor did it even suggest, that Kerr-McGee's substantial compliance with applicable regulations was not available as a defense to the imposition of punitive damages under state law.[3]

Moreover, contrary to respondent's assertion (Br. in Opp. 15), the jury did not specifically find that Kerr-McGee was not in substantial compliance with applicable regulations. In fact, the district court's instructions permitted the jury to award punitive damages even if it found that Kerr-McGee was in substantial compliance. Pet. App. 194a-195a.

The substantial compliance issue implicates important state policies because of the increasingly frequent reliance by plaintiffs on theories of liability under state tort law in seeking punitive damages for conduct that is in substantial compliance with comprehensive regulatory programs. In light of the pervasive nature of the regu-

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[3] Notwithstanding respondent's contrary contention (Br. in Opp. 15-16), we do not suggest that this Court should grant review to resolve the substantial compliance issue. Our position is simply that the court of appeals should have certified this important and concededly unsettled state law issue to the Oklahoma Supreme Court.

latory scheme involved here, the court of appeals should have certified the substantial compliance issue.

CONCLUSION

For the foregoing reasons, and those previously stated in the petition, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be reversed summarily, and the case should be remanded to that court with directions to enter judgment in favor of petitioners on the issue of punitive damages. In the alternative, the judgment of the court of appeals should be vacated and the case should be remanded to that court with directions to certify the state law questions to the Oklahoma Supreme Court.

Respectfully submitted,

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